

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10
THE STATE OF IDAHO
UNITED STATES DEPARTMENT OF ENERGY

IN THE MATTER OF:)
)
THE U.S. DEPARTMENT OF ENERGY) DOCKET NO. 1088-06-29-120
IDAHO NATIONAL ENGINEERING AND)
ENVIRONMENTAL LABORATORY,)
IDAHO FALLS, IDAHO)

AGREEMENT TO RESOLVE DISPUTES

(A) INTRODUCTION

(1) This "Agreement To Resolve Disputes" (Agreement) is a settlement of disputes arising under a Federal Facility Agreement And Consent Order (FFA/CO) at the Idaho National Engineering And Environmental Laboratory (INEEL). The parties that signed the FFA/CO (the parties) are the U.S. Environmental Protection Agency, Region 10 (EPA), the State of Idaho (Idaho) and the U.S. Department of Energy (DOE).

(2) The disputes involve DOE's failure to comply with required deadlines for the submission of primary documents for two operable units: Operable Unit 1-07B (Test Area North Ground Water or TAN) and Operable Unit 7-10 (Pit 9).

(3) The parties agreed to address these disputes through an informal dispute resolution process that commenced on November 18, 1996. The parties have resolved the disputes by agreement on a stipulated penalty and revised deadlines for each operable unit. In addition, the parties have agreed to revise deadlines for Operable Unit 7-13/14 based on deadlines to be established for Pit 9.

(4) This Agreement sets forth a general summary of events for Pit 9 and TAN and explains the basis for the resolution of penalties and for the agreement on revised deadlines.

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(B) BACKGROUND

(5) On December 9, 1991, EPA, Idaho and DOE entered into a FFA/CO for the investigation and cleanup of INEEL. The FFA/CO was entered into pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., and the Hazardous Waste Management Act, Idaho Code § 39-4401, et seq.

(6) The FFA/CO establishes requirements for: (a) identification and performance of interim cleanup actions, (b) performance of investigations to determine fully the nature and extent of threats to public health or welfare or the environment caused by releases of hazardous substances, (c) performance of studies to identify, evaluate and select cleanup actions, (d) implementation of selected cleanup actions and (e) compliance with federal and state hazardous waste laws.

(7) The INEEL site is divided into ten waste area groups (WAGs). Each WAG contains several operable units. The operable units generally cover specific geographic areas at the site.

(8) The FFA/CO designates certain documents as "primary documents," e.g., the Remedial Design (RD) and the Remedial Action Work Plan (RA Work Plan). Under the FFA/CO, a primary document is subject to a stipulated penalty if it is not submitted by the established deadline. The stipulated penalty is up to \$5,000 for the first week and up to \$10,000 for each week thereafter that the document is not submitted.

(9) Deadlines for submission of primary documents for Pit 9 were established in the revised RD/RA Scope of Work (SOW) dated January 1995. The deadline for submission of the RD was January 8, 1996, and for submission of the RA Work Plan was February 22, 1996.¹

(10) Deadlines for submission of primary documents for TAN were established in the RD/RA SOW dated December 1995. The deadline for submission of the Phase B RD/RA Work Plan was November 18, 1996.

(11) The FFA/CO provides that DOE may request an extension to a deadline for submission of a primary document. DOE must show "good cause" for the requested extension

¹ As of the effective date of this Agreement, the parties agree that enforceable deadlines under the FFA/CO will be the date at the end of the month that the document is due.

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in order to avoid assessment of a penalty. Examples of good cause are set forth in Paragraph 13.2 of the FFA/CO, including any event mutually agreed to by the parties as constituting good cause. If EPA and Idaho agree that good cause has been established by DOE, the deadline is extended and a penalty is not assessed for the period corresponding to the good cause. In the absence of good cause for all or part of a requested extension, payment of a stipulated penalty is required under the FFA/CO.

(C) PIT 9

(12) Pit 9, located at the Radioactive Waste Management Complex in the southwestern portion of INEEL, was operated as a waste disposal pit from November 1967 to June 1969. Pit 9 is approximately an acre in size and is an average of 17.5 feet deep. The waste disposed in Pit 9 includes transuranic (TRU) waste generated at the Rocky Flats Plant in Colorado with additional low-level and other miscellaneous chemical wastes generated at INEEL.

(13) The Record of Decision (ROD) for Pit 9 dated September 1993, requires performance of an interim action to excavate and treat buried waste that is greater than 10 nanocuries per gram TRU. The parties intend that information acquired as a result of the cleanup of Pit 9 will be used for the cleanup of the TRU-contaminated Pits and Trenches area of the site, Operable Unit 7-13/14, e.g., to evaluate remedial alternatives. The Pit 9 wastes are required to be treated to remove radionuclides and other hazardous constituents and to reduce the toxicity, mobility and/or volume of the wastes. The concentrated TRU treatment residual will be -- and other material may be -- stored on an interim basis pending a final decision on disposal under Operable Unit 7-13/14.

(14) The retrieval and treatment of heterogeneous, buried mixed TRU waste in a safe and efficient manner is a complex, technical challenge. Excavation, segregation and treatment require different technologies that need to be integrated with each other, capable of remote operation (i.e., no direct human contact with the hazardous/radioactive material) and effective at minimizing the amount of radioactive material that will require management outside Pit 9. Adding to the technological complexity is that the spatial distribution, physical condition, amounts and types of wastes in Pit 9 cannot be confirmed until the actual retrieval of wastes from Pit 9 begins.

(15) Retrieval and treatment of buried mixed TRU waste has not yet been effectively performed on a large-scale at INEEL or at any other DOE facility across the country.

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(16) DOE authorized award of a fixed-price subcontract with Lockheed Environmental Services and Technologies (LESAT) in August 1994.² Lockheed Martin Idaho Technologies Company (LMITCO), the current management and operating (M&O) contractor for DOE at the INEEL, is authorized by DOE to oversee performance of the fixed-price contract.³

(17) During 1995, numerous significant design problems were discussed by EPA, Idaho, DOE and its contractors but many were not resolved.

(18) Throughout 1995, DOE wrote letters to and had meetings with LMITCO in which DOE stated that actions needed to be taken by LMITCO to ensure that LMAES would complete and submit adequate designs in accordance with the FFA/CO deadlines.

(19) In January 1996, design documents were provided by LMAES to LMITCO and DOE, and then to EPA and Idaho. DOE acknowledged, however, that the full remedial design had not been submitted by LMAES. Components of the design that were deficient included, in part, the chemical leach system, robotics, retrieval, melter, support facility, off-site systems and resolution of regulatory issues.

(20) DOE requested extensions to the deadlines for submission of the RD and RA Work Plan. To a significant extent, information in the RD is needed to complete the RA Work Plan. DOE asserted that good cause for the extensions was the highly complex nature of the design, the revised technical approach, the aggressive project schedule, the nature of the fixed-price subcontract and the limited ability of DOE to influence the subcontractor. During 1996, DOE also continued to direct LMITCO to ensure that LMAES take appropriate corrective action for Pit 9.

(21) By letter dated October 29, 1996 to DOE, LMITCO identified key issues leading to Pit 9 project failures, including LMAES' demonstrated lack of understanding of pertinent project requirements (e.g., DOE Orders, design requirements, environmental

² In July 1996, LESAT changed its name to Lockheed Martin Advanced Environmental Systems (LMAES).

³ At the time of the initial subcontract award, EG&G Idaho, Inc., was the M&O contractor at INEL. Lockheed Idaho Technologies Company (LITCO) succeeded EG&G in that capacity in October 1994. LITCO changed its name to LMITCO in July 1996.

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regulations), problems with the chemical leach system, overly optimistic planning assumptions, and the failure of LMITCO and LMAES to timely identify issues and problems.⁴

(22) EPA and Idaho responded that DOE had not demonstrated good cause for an extension.

(23) DOE's requests for extensions were not resolved until this Agreement was negotiated during an informal dispute resolution period. The terms of the resolution are as follows:

- (a) The enforceable deadline for submittal of a draft revised Remedial Design/Remedial Action Scope of Work (RD/RA SOW) for Pit 9 is September 30, 1997. Failure to submit the RD/RA SOW by this date will trigger the stipulated penalty provisions under Part XI of the FFA/CO.
- (b) Several issues critical for development of the Remedial Design and Remedial Action Work Plan are expected to be resolved prior to, or as part of, the revised RD/RA SOW. New deadlines, including deadlines for submission of the Remedial Design and the Remedial Action Work Plan, will be established in the approved RD/RA SOW.⁵
- (c) The parties agree that, for purposes of penalty assessment, the period of delay for the Remedial Design is from January 8, 1996 to September 30, 1997 (90 weeks).
- (d) The parties agree that for, purposes of penalty assessment, the period of delay for the Remedial Action Work Plan is from February 22, 1996 to September 30, 1997 (84 weeks).

⁴ By letter dated November 1, 1996, DOE forwarded LMITCO's letter to EPA and Idaho.

⁵ Table 2 of the RD/RA Scope of Work for Pit 9 dated January 1995, contains submittal dates and document types for interim action deliverables. Pursuant to this Agreement, the submittal dates set forth in Table 2 are no longer in effect and will be revised in the new RD/RA SOW submittal that is due on September 30, 1997.

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- (e) For purposes of resolving this matter, EPA and Idaho agree that good cause has been demonstrated for 40 weeks for the Remedial Design and 39 weeks for the Remedial Action Work Plan.
- (f) EPA and Idaho agree that good cause exists for the agreed-upon periods, i.e., no assessment of a penalty is warranted during that time, because the cleanup is complex, the integration of several innovative technologies has been more difficult than anticipated, the protection of workers and others from radiological hazards while remediating Pit 9 has raised complex design issues that have taken time to address, DOE has repeatedly directed LMITCO to perform necessary corrective actions, and DOE has negotiated in good faith with EPA and Idaho to resolve these issues through an informal dispute resolution process.
- (g) Accordingly, the parties agree that the sum of the stipulated penalties under the FFA/CO for a 50-week delay in submitting the Remedial Design and a 45-week delay in submitting the Remedial Action Work Plan is \$940,000.

(24) DOE further agrees that it will seek and obtain the approval of EPA and Idaho should current plans for the cleanup of Pit 9 be substantially changed. In such event, the parties will discuss and agree on appropriate remediation measures for Pit 9. The contents of a revised RD/RA SOW will be based on these discussions and may not necessarily include all items identified in Part 2.11 of the FFA/CO Action Plan.

(D) OPERABLE UNIT 7-13/14

(25) The parties intend that information from the cleanup of Pit 9 will be used in the baseline risk assessment (BRA), remedial investigation/feasibility study (RI/FS) and ROD for the remaining Pits and Trenches, Operable Unit 7-13/14. Such information would include information on the contents of Pit 9, e.g., contaminant migration and container integrity, and the performance, effectiveness and cost of the cleanup technologies employed at Pit 9.

(26) The current FFA/CO deadline for the draft RI/FS is September 1997 and for the draft ROD is July 1998. Information from Pit 9 will not be available to allow DOE to meet these dates. The parties agree that these deadlines will be extended to allow for Pit 9 information to be available for evaluation in the 7-13/14 BRA, RI/FS and ROD. DOE shall propose new deadlines for the 7-13/14 RI/FS and ROD at the time it submits the revised RD/RA SOW for Pit 9. If not agreed to by EPA and Idaho within 30 days of proposal, the new deadlines will be subject to dispute resolution under Part IX of the FFA/CO.

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(27) The parties further agree, however, that should it appear that the submission of the Limited Production Test (LPT) Report for Pit 9 will not be completed in a timely manner based on the deadline established for the LPT Report in the Pit 9 RD/RA SOW, DOE shall assume that Pit 9 information will not be used in the above-referenced 7-13/14 deliverables. At that time, DOE shall immediately initiate independent characterization and treatability studies for purposes of evaluating the feasibility of alternatives for 7-13/14, the parties shall discuss the establishment of appropriate deadlines for the 7-13/14 deliverables, and subsequently DOE shall submit a revised RI/FS SOW for 7-13/14.

(E) TEST AREA NORTH

(28) The Test Area North (TAN) complex is located in the northern portion of INEEL and extends over an area of approximately 30 square kilometers.

(29) Operable Unit 1-07B is a ground-water remediation at TAN. A Record of Decision (ROD) for an interim action was signed in September 1992 and required installation of a treatment system to reduce contaminants of concern to prescribed performance standards.

(30) The ROD for the final action (final ROD) was signed in August 1995 and required DOE to pump and treat to reduce levels of trichloroethene (TCE) and other volatile organic compounds (VOCs) to below maximum concentration levels (MCLs) under the Safe Drinking Water Act (or to acceptable risk levels if an MCL is not available) and to prevent further migration of the plume. Treated water will be reinjected in the plume upgradient of the extraction well. The overall objective is to restore the contaminated plume to at or below drinking water standards within 100 years. The final ROD authorized continued use of the existing treatment system with some modifications. The final ROD further required treatability studies to determine whether new and innovative technologies may be more effective than the selected remedy.

(31) Several types of radionuclides, e.g., strontium-90, tritium, are also present in the ground water at TAN. In the final ROD, EPA and Idaho agreed to review the results from the treatment system and other treatability studies prior to establishing radionuclide performance standards.

(32) Information acquired through the use of the existing treatment system indicated that the existing system was not capable of meeting the final ROD's requirements for reductions in VOC levels. Further, the removal of radionuclides was problematic. Many discussions took place between the parties in 1996 to resolve these issues.

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(33) EPA and Idaho concurred with DOE's determination that placement of new extraction wells approximately 2,000 feet downgradient of the current extraction wells (i.e., in the vicinity of the 1 ppm TCE concentration isopleth) and construction of a new treatment system would facilitate achievement of the VOC cleanup levels in accordance with the final ROD for TAN. Concentrations of radionuclides 2,000 feet downgradient are expected to be below MCLs and require no treatment.

(34) The parties have also agreed to install and test extraction wells in the new location prior to the submission of the RD/RA Work Plan for the new treatment plant. Information acquired from aquifer tests, e.g., necessary pumping rates, will be used in developing the RD/RA Work Plan for the design of the new treatment system.

(35) EPA, Idaho and DOE have also had extensive discussions regarding an appropriate procurement strategy for design and construction of the new treatment system.

(36) The proposed modifications do not alter the ROD's requirements for evaluation of other innovative technologies that may augment the pump and treat system and provide significant savings over the lifetime of the project.

(37) In July, 1996, DOE advised EPA and Idaho that the FFA/CO deadlines for TAN would need to be modified. In October, 1996, DOE formally requested an extension of the deadlines for TAN. In November, 1996, EPA and Idaho denied the request.

(38) DOE's request for an extension was not resolved until this Agreement was negotiated during the informal dispute resolution period. The terms of the resolution are as follows:

- (a) The new deadline for submission of the revised Phase B RD/RA SOW is June 30, 1997. Dates for submission of design functional and operational requirements will be established in the revised RD/RA SOW.⁶
- (b) The new deadline for submission of the RD/RA Work Plan is April 30, 1999.

⁶ The new deadlines identified in Paragraph (38)(a)-(c) supersede deadlines for the same deliverables set forth in the RD/RA SOW dated December 1995. In addition, the revised SOW will include new deadlines and target dates for primary and secondary documents, respectively, as identified in the previous SOW.

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- (c) The new deadline for submission of the Treatability Study Report is October 31, 1999.
- (d) The parties agree that good cause exists for all but four weeks of the extension to the deadline for submission of the RD/RA Work Plan.
- (e) The basis for good cause is the parties' agreement on the need for additional time to construct and test the new extraction wells and design and construct a new treatment system. The parties agree that these measures are necessary to achieve the final ROD's cleanup levels for VOCs (see also Paragraph 31 above regarding radionuclides). Also, DOE has negotiated in good faith with EPA and Idaho to resolve these issues through an informal dispute resolution process.
- (f) The penalty under the FFA/CO for four weeks of delay is up to \$35,000. For purposes of settlement, the parties agree that the appropriate stipulated penalty is \$30,000.

(F) PAYMENT OF PENALTY

(39) The parties agree that the total stipulated penalty amount in settlement of current disputes at INEEL is \$970,000.

(40) DOE agrees to request appropriation and authorization from Congress in its Fiscal Year (FY) 1999 budget request for payment in the amount of \$100,000 to the Hazardous Substances Trust Fund. DOE shall make a payment in the amount of \$100,000 to the Hazardous Substance Trust Fund within ninety (90) days of receiving authorization to spend funds appropriated for the penalty. The check shall be made payable to the Hazardous Substances Superfund and state the name of the site (INEEL), the site identification number (10A9), and the title and docket number of this Agreement. The check shall be forwarded to:

U.S. Environmental Protection Agency
EPA Region 10 Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

(41) Copies of the check shall be sent to Wayne Pierre, U.S. Environmental Protection Agency (ECL-113), 1200 Sixth Avenue, Seattle, Washington 98101 and Dean Nygard, Division of Environmental Quality, Idaho Department of Health and Welfare, State of Idaho, 1410 North Hilton, Boise, Idaho 83706-1255.

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(42) In the alternative, DOE may remit payment by electronic transfer to EPA Region 10. EPA Region 10's Agency Location Code is 68-01-1010. DOE shall contact Joe Penwell of EPA Region 10's Finance Office at 206-553-2968 prior to making the transfer and provide the information required by Paragraph 40 above. Documentation of the transfer shall also be sent to the persons identified in Paragraph 41 above.

(43) In the event that DOE shall fail to pay the \$100,000 amount within 90 days of receiving authorization to do so, DOE shall pay the \$100,000 amount plus interest to the extent the payment of interest is permitted by law. Interest shall accrue at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507.

(44) The balance of the penalty shall be reduced by the \$870,000 amount of the Supplemental Environmental Projects as described in Section (G) of this Agreement.

(G) SUPPLEMENTAL ENVIRONMENTAL PROJECTS

(45) Within 90 days of the effective date of this Agreement, DOE shall make a payment in the amount of \$870,000 to Idaho to be held in trust to fund Supplemental Environmental Projects (SEPs). The payment shall be made by electronic funds transfer.

(46) All monies paid to Idaho pursuant to Paragraph (45) above shall be held as a Trust Fund in an account which will be invested to accrue interest to the Trust Fund in accordance with Idaho Code § 67-1210.

(47) The parties to this Agreement, or their successors or designees, shall be the trustees of the Trust Fund and shall be authorized and empowered, consistent with this Agreement, upon unanimous agreement of all three parties, to direct expenditures of monies from the Trust Fund to fund SEPs. Each party shall designate a person to represent that party as trustee and, within ten days of the effective date of this Agreement, each party shall notify the other parties of the name of the person who has been so designated.

(48) SEPs, for the purpose of this Agreement, shall be projects or portions thereof which benefit the public and the environment in Idaho by preventing pollution, reducing the amount of pollution reaching the environment, or enhancing, restoring or maintaining the quality of an environmental resource. In evaluating proposed SEPs, the trustees may give preference to projects that restore, enhance or maintain water quality or riparian habitat related to the Snake River Plain Aquifer, the Snake River or its tributaries. The trustees may also consider the nexus of potential SEPs to INEEL.

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(49) The intent of the parties is to approve the disbursement of all monies in the Trust Fund within one year from the date that DOE transfers the \$870,000 amount to Idaho. The party primarily responsible for implementing or overseeing each SEP will be determined at the time that funds are approved for that SEP. Any party may issue appropriate press releases describing the SEPs funded by the Trust Fund.

(50) Disputes regarding the performance of the SEP shall be resolved pursuant to Part IX of the FFA/CO.

(H) GENERAL PROVISIONS

(51) In the event that DOE fails to comply with any provision of this Agreement with respect to payment of the \$100,000 amount or with respect to performance of the SEP, EPA and Idaho reserve the right to pursue any remedy available under the FFA/CO or under CERCLA.

(52) The Parties agree that this Agreement resolves all disputed matters relating to DOE's previous requests for extensions of time for Pit 9 and TAN and EPA's and Idaho's previous denials thereof. DOE agrees not to further dispute the extensions to the schedules or the determinations of good cause set forth above. EPA and Idaho agree that they will not compel compliance or assess stipulated penalties with respect to previous deadlines that have been superseded by this Agreement.

(53) Deliverables to be submitted pursuant to the new deadlines set forth in this Agreement shall be developed in accordance with requirements described in the FFA/CO.

(54) Compliance with this Agreement shall not affect performance of all other requirements under the FFA/CO.

(55) DOE will use best efforts to employ adequate management controls to ensure timely performance of requirements under this Agreement and the FFA/CO.

(56) No provision of this Agreement shall be interpreted to require obligation or payment of funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

(57) Nothing in this Agreement shall constitute an admission on the part of DOE, in whole or part, in any proceeding except in a proceeding to enforce this Agreement.

(58) The effective date of this Agreement shall be the date on which it has been signed by all three signatories.

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(59) EPA, Idaho and DOE individually certify that the signatories to this Agreement have the authority to bind their respective agencies to the requirements of this Agreement.

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IT IS SO AGREED:

By: Chuck Clarke
Chuck Clarke, Regional Administrator
U.S. Environmental Protection Agency
Region 10

Date: 3-18-97

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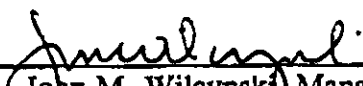
IT IS SO AGREED:

By: 
Philip E. Batt, Governor
State of Idaho

Date: 3/18/97

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IT IS SO AGREED:

By:  Date: 3/17/97
John M. Wilcynski Manager
U.S. Department of Energy
Idaho Operations Office